tainee. *Lim Kit Siang's* case[4] is, therefore, distinguishable.

In all the circumstances, I have no discretion in the matter, and so, this application is dismissed.

Application dismissed.

Solicitors: *Karpal Singh & Co.*

WAN DAUD BIN WAN JUSOH v. MOHAMED BIN HAJI ALI & ANOR.

DAUD BIN JUSOH v. ANNUAR BIN HAJI MUSA & ANOR.

MOHD. NOR BIN ISMAIL v. MOHD. ZAIN BIN ABDULLAH & ANOR.

[O.C.J. (Wan Yahya J.) 30 April 1987]

[Kota Bharu -- Election Petition Nos. 33-2-86, 33-3-86, 33-4-86]

Elections – Election petitions – Amendment of – Whether right to amend excluded by statute – Whether petitions were in conformity with requirements of election laws – Election Offences Act 1954, ss. 32, 34, 36(a), 38(2) & 42 – Election Petition Rules 1954, rr. 4 & 16 – R.H.C. 1980.

The three petitioners were unsuccessful candidates in the general elections held in 1986 and, in their respective petitions, had alleged that their request for recounts were not acceded to by the returning officers. The six respondents, who were the elected candidates and the returning officers in the petitions, took out a motion to strike out the petition on the grounds that the petitions did not conform with the mandatory provisions of the election laws. The first and second petitioners then sought to redress the imperfections in their petitions by motions to amend.

The respondents took objections to these motions to amend. They contended that there was no provision in the election laws for any kind of amendments to be made except those under section 38(2) of the Election Offences Act ("the Act") for withdrawal only, and even if this provision was to be relied on, the time prescribed for amendment to be made had already elapsed, having regard to rule 16 of the Election Petition Rules 1954. It was also contended that the petitions were defective as they were not made in accordance with rule 4 of the Election Petition Rules 1954 ("the Rules") and therefore had not met with the requirements of section 32 of the Act.

Held, dismissing all the three petitions: (1) rule 16 of the Rules does not have the effect of excluding the right of the petitioner to amend in accordance with the Rules of the High Court. Rule 16 merely lays down the stage when the petition is deemed to be at issue. The rule did not stipulate that once the petition is at issue no further remedy is available to the petitioner under the Rules of the High Court. On the contrary, the Rules of the High Court state that the application for amendment could be accorded at any stage of the proceeding subject to certain criteria;

(2) the criteria for amendment for such cases must, in addition to the express provisions of the election laws, be considered in the light of the principles on amendment as judicially practised in all applications under the rules of court, *i.e.* it will not embarrass, prejudice or cause any injustice to the other party. The amendment must also not be for the purpose of changing, altering or introducing any new charge or cause of action;

(3) the court did not consider the amendments to be prejudicial to the case of the respondents and accordingly the petitioners' application to amend the respective petitions were allowed;

(4) a petitioner who is desirous of challenging the election of a successful candidate must first of all be able to show the court that he has a right to be heard under any or all of the five situations enumerated under section 32 of the Act. The format and essential contents of the petition which he is required to conform with are prescribed under rule 4. Para (b) of sub-rule (1) of that rule enacts in peremptory language that the petition shall state the facts and grounds relied on to sustain the prayer. This requirement is further repeated under para 3 of the specimen form shown in sub-rule (4). A petition under rule 4 therefore must not only narrate the facts complained of but must relate or associate the complaints with the provision of the election laws the respondent is alleged to have transgressed;

(5) the facts here fall short of the requirements of rule 4. No reason was given as to how the right of the petitioner to a recount has arisen and neither is it stated that the refusal was against any specific provision of the law;

(6) in respect of the third petition, the petitioner was ostensibly not a person qualified to present a petition under section 34 of the Election Offences Act 1954, as he was not shown in the relevant gazette notification as a candidate who stood for the election;

(7) the petitions were dismissed pursuant to section 36(a) of the Act and the successful candidates were duly elected to their respective parliamentary constituencies in the last general elections.

Cases referred to:

(1) *Zulkarnaini bin Mohamed Noor* v. *Syed Omar bin Mohamed & Anor.* [1979] 2 M.L.J. 143 (expld).

(2) *Sabdin Ghani* v. *Mohamed Saidi Lampoh & 25 Other Election Petitions* [1983] 2 M.L.J. 61 (consd).

(3) *Zulkifle bin Majun* v. *Dason Gaban* [1983] 1 M.L.J. 396 (refd).

(4) *Maude* v. *Lowley* (1873-74) L.R. 9 C.P. 165 (refd).

(5) *Chong Thain Vun* v. *Watson & Anor.* [1968] 1 M.L.J. 65 (refd).

ELECTION PETITIONS.

C. Jegathesan for the petitioners.

Mohamed Apandi bin Ali for the first respondent.

T. Selventhiranathan for the second respondent.

Cur. Adv. Vult.

Wan Yahya J.: The petitioners herein, Wan Daud bin Wan Jusoh (Election Petition No. 2/86), Daud bin Yusoh @ Yusof (Election Petition No. 3/86) and Mohd. Zain bin Ismail (Election Petition No. 4/86) were the unsuccessful candidates in the respective parliamentary constituencies of Nilam Puri, Peringat and Bachok in the state of Kelantan at the last general election held on 3 August 1986.

In all three petitions filed on 2 October 1986 the petitioners alleged that that their request for recounts were not acceded to by the returning officers. In Petition No. 2/86, the petitioner therein designated two grounds, in Petition No. 3/86 one ground against the refusal, but the petitioner in Petition No. 4/86 communicated no reason whatsoever for making his request for recount.

As the issues involved in all three cases are almost identical in nature, the parties had propitiously consented to all three petitions being tried together. In this judgment therefore, I shall be alluding to Petition No. 2/86 as the "first petition", Petition No. 3/86 as the "2nd petition" and Petition No. 4/86 as the "3rd petition". On 2 March 1987 all six respondents (elected candidates and the returning officers in all three petitions) took out a motion to strike out the petition on the grounds that the petitions did not conform with the mandatory provisions of the election laws. The first and second petitioners then sought to redress the imperfections in their petitions by motions to amend. The matter came before Abdul Malek J. who rightly decided that both motions be heard together before the election judge. Counsel for both parties had at the outset of the hearing before me intimated their consent to this direction.

The relevant paragraphs of the first petitioner's (2/86) proposed amendments, as written on the motion, are as follows:

"
...

6. That the returning officer Haji Hassan bin Hussein contrary to the Gazette Notification *and contrary to section 32(b) of the Election Offences Act* did not locate polling station 022/22 for Lubok Jambu, in Bangunan Jawatankuasa Kemajuan Kampong Lubok Jambu.

...

11. By this act of not complying with Gazette Notification No. PPN(KN) 387(11) the returning officer, the second respondent, had ~~at one~~ acted illegally and ~~corruptly by contriving to impede or prevent the free exercise of the franchise of voters sympathetic to your petitioner~~ *contrary to section 32(b) of the Election Offences Act.*

...

16. The returning officer without acceding to this request and without ascertaining that I was indeed entitled to a recount *contrary to section 32(b) of the Election Offences Act* declared the winner to be Mohamed bin Haji Ali."

[*Editorial Note:* The italicized words are the proposed additions and the words being shown as crossed out are the proposed deletions.]

In the second petition (3/86), the single amendment is similarly worded as paragraph 6 of the first petition followed by further words stating that "such non-compliance affected the results of the election".

Counsel for the respondents took objections on these motions to amend on several grounds. First, they contend that there is no provision in the election laws for any kind of amendments to be made except those under section 38(2) of the Election Offences Act for withdrawal only, and, even if this provision is to be relied on, the time prescribed for amendment to be made had already elapsed. According to him, rule 16 of the Election Petition Rules 1954 deems the petition to be at issue on the expiration of the time limited for making a petition. Counsel then cites two Latin maxims, *expressio unius est exclusio alterius* and *expressum facit cessare tacitum*, and on the strength of these maxims argues that if the legislature had intended to allow any amendments after the petitions were deemed to be at issue, it would have expressly mentioned so in the Rules. Although I would unhesitatingly uphold the erudition ensuing from such maxims, their applicability in the present instant seems to be somewhat inappropriate. If Parliament had intended to preclude any form of amendment after the petitions are deemed to be at issue, then it would have by expressed words excluded the effectuation of all other laws instead of spelling it out unequivocably in section 42 of the Act – "the procedure and practice on election petition shall be required by the rules of court". I quite agree with counsel for the respondents that the provisions of election rules are to be complied with in dealing with election cases; but where the provisions are indeterminate or when the rules are silent on any issue, then the rules of court should be applied.

In the past, rulings in this area of amendment have always emerged in the form of judge-made laws. No absolute consistencies in the rulings were possible as election cases continue to be decided by different judges through unimpeachable judgments. However, the advantage in this system

appears to lie in the contingency for judges to adapt the rulings to more pragmatic applications in our modern electoral system.

I am unable to agree with counsel for the respondents that rule 16 has the effect of excluding the right of the petitioner to amend in accordance with the Rules of the High Court. Rule 16 merely lays down the stage when the petition is deemed to be at issue. The rule did not stipulate that once the petition is at issue no further remedy is available to the petitioner under the Rules of the High Court. On the contrary, the Rules of the High Court state that the application for amendment could be accorded at any stage of the proceeding subject to certain criteria.

The common ground for refusing amendment in all cases cited by the respondents had all along been based on embarrassment and prejudices into which the respondents would be placed if such an amendment were to be allowed. Amendments which have the effect of altering the petitioner's cause of action have always been rejected.

In the case of *Zulkarnaini bin Mohamed Noor* v. *Syed Omar bin Mohamed & Anor.*,[1] cited by both parties in their arguments, Mohamed Zahir J. held that the court could apply the rules of court in the application of amendment except when expressly disallowed by the election laws. The learned judge then went on to cite section 38(2), rule 7 and rule 8 as instances when the rules of court will be subjected to statutory limitations prescribed by the Election Act and Rules. The judge disallowed amendment on ground that error in citing dates in the petition had led to the conclusion that the petition was founded on a "non-existent election" and therefore had rendered the petition a nullity.

Mr. T. Selventhiranathan, Senior Federal Counsel, appearing on behalf of the second respondent, referred to the following passage from the judgment:

> "... In cases founded on contracts or torts, the court may at times allow amendments if they are still not statute-barred. But in the case of an election petition, time to present the election petition is as short as 21 days and if amendments are sought beyond this period the case is already time-barred and the court ought not to allow such amendment."

He submits this as the authority supporting the argument that amendment in an election petition is limited to a 21-day period.

My own impression on this part of the judgment is that the learned judge was merely referring to the limitation provided under section 38(2) and not generally to the entire election laws when he made these remarks. If it is to be construed otherwise, then this passage is clearly inconsistent with his earlier findings when he had restricted the limitation for amendment period to three instances only.

The more recent judgment in *Sabdin Ghani* v. *Mohamed Saidi Lampoh & 25 Other Election Petitions*[2] seems to open a more liberal construction of the rule. In that case, the petitioners had given wrong dates or in some cases omitted to give any date at all. Rule 4(1)(b) of the Election Petition Rules merely provided that the petition shall state "the holding and result of the election" but did not specify that the actual date should be expressly written on the petition. The form under rule 4(4), however, made provision for the date to be included. Seah J. (as he then was), applying the doctrine of purposive construction, held that the provision is not mandatory as the heading of sub-rule (4) itself stated that the form provided or "one to the like effect" shall be sufficient.

In the case of *Zulkifle bin Majun* v. *Dason Gaban*,[3] Seah J. also allowed the motion to amend even though notice was given past the period prescribed under section 38(2) of the Act. The present case before us is of course not restricted to any time period and therefore less serious in nature. In the course of his judgment, the learned judge referred to *Halsbury's Laws of England*, 4th Ed. Vol. 15 para 845 at p. 462 on the subject of amendment of an election petition. For the purpose of our present argument, I need only refer to the last two paragraphs cited by the learned judge as follows:

> "The objection to adding a charge after the time for presenting a petition has elapsed does not apply to withdrawing a charge, and it would seem that this may be done. The withdrawal of that portion of a petition which claims the seat cannot, however, be effected by way of amendment because the rights of the electors would be affected by their not having the opportunity of substituting another petitioner. Allegations which disclose no offence or are otherwise immaterial may be struck out. An amendment to cure a mere clerical error in a charge already made, or a variance between the petition and evidence, may possibly be allowed."

It seems clear from the above that the amendment to cure clerical errors or to correct minor inmaterial allegation may be made at any time before the hearing commences. Similarly, any amendment to cure clerical errors or to correct minor

differences in the petition may be allowed. The passage referred to above, however, appears to convey more of feasible rather than authoritative information for allowing amendments. The criteria for amendment for such cases must in addition to the expressed provisions of the election laws be considered in the light of the principles on amendment as judicially practised in all applications under the rules of court, *i.e.* it will not embarrass, prejudice or cause any injustice to the other party.

One other important criterion to be strictly observed when considering applications of this kind is that the amendment is not designed for the purpose of changing, altering or introducing a new charge or cause of action. The rationale behind this restriction is reflected in the same judgment of Seah J. (as he then was) in the following passage cited from *Maude* v. *Lowley*[4] in which Lord Coleridge C.J. states (at p. 174):

"The respondent has a right to know once for all within the 21 days what are the precise charges which he has to meet, and may then destroy any documents and vouchers he may possess that might have reference to any other charges. Mr. Tennant has also pointed out that, after the expiration of the 21 days, it would be too late for anyone else to present a fresh petition; and that to allow a petitioner to amend so as *substantially* to make the amended petition a fresh one would be conferring upon him a privilege which no other person could possess."

(emphasis is mine)

In contemplation of the mischief against which the legislature sought to prevent through the enactment of various mandatory rules of the election laws, I shall consider the three paragraphs of the proposed amendments.

In paragraph 6 of the first petition, the amendment is for the insertion of the words "and contrary to section 32(b) of the Election Offences Act". I cannot see how the introduction of these words can possibly prejudice the respondents' case. The mere mention of section 32(b) of the Act does not consist of adding a new charge. That section is only a general provision enabling the petitioner to make this petition. Although rule 4(1)(a) of the Election Petition Rules requires the specification of the right of the petitioner to petition, under section 34 of the Act, there is no mandatory provision requiring any petitioner to cite this section in his petition. Section 32 itemizes broadly five situations, *viz.* in paragraphs (a), (b), (c), (d) and (e) under which the election of a candidate can be avoided. It is not obligatory for a petitioner to assert *verbatim* under which section and paragraph his petition is grounded. He may use words to the like effect without citing the actual section or paragraph so long as the words are sufficient to identify his eligibility to make the petition for avoidance under all or any of the five paragraphs mentioned therein. I am not ruling at this juncture that the petitioner has complied with the requirements of rule 4 but that he had used words generally suggestive of his right to petition under section 4(b) and the purpose of his amendment is merely to clarify these words so as to confine the petitioners' right to paragraph (b) only. In my opinion, the citation of this enabling provision is not tantamount to the addition or change in the petitioners' cause of action but is merely inserted to clarify it; or as Mr. Jegathesan in his inimitable style puts it, he was merely tagging his existing allegation with a perfunctory label. Similarly I hold that the addition of the words stating "non-compliance affected the result of the election" (without any supporting allegation) to be an immaterial amendment. It was impliedly contended by the respondents that these words amounted to adding a charge which was not there. My view is that these words were placed in section 32 to denote the eligibility of the petitioner to sustain his prayer for declaration and consequently the methods which he will have to prove to the satisfaction of the election judge. These words are not part of the mandatory disclosure which is to be included in the petition as required by rule 4(1) and rule 4(4).

I would therefore allow the proposed amendment under paragraph 6 of both the first and second petitions. As for paragraph 11 of the first petition, the amendment consisted of the striking out of the phrase "at one" followed by the words "corruptly by contriving to impede or prevent the free exercise of the franchise of voters sympathetic to your petitioner." The first paragraph of the amendment is obviously to correct a grammatical error and as for the other part I cannot perceive it as intended for any purpose other than withdrawing superflous words which do not support any charge. As in the other amendments, I do not consider it prejudicial to the case of the respondents and I would accordingly allow the application.

I now proceed to consider the motion to strike out the petition as amended. Both Encik Apandi and Mr. T. Selventhiranathan for the respondents submit that the petitions are defective because they are not made in accordance with rule 4 of the Election Petition Rules and therefore the petition

had fallen short of the requirements of section 32 of the Act.

Now section 32 reads:

"The election of a candidate at any election shall be declared to be void on an election petition on any of the following grounds which may be proved to the satisfaction of the election judge:

(a) ...

(b) non-compliance with the provisions of any written law relating to any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;"

My understanding of the section is that a petitioner who is desirous of challenging the election of a successful candidate must first of all be able to show the court that he has a right to be heard under any or all of the five situations enumerated under section 32. The format and essential contents of the petition which he is required to conform with are prescribed under rule 4. Paragraph (b) of sub-rule (1) of that rule enacts in peremptory language that the petition shall state the facts and grounds relied on to sustain the prayer. This requirement is further repeated under paragraph 3 of the specimen form shown in sub-rule (4). A petition under rule 4 therefore must not only narrate the facts complained of but must relate or associate the complaints with the provision of the election laws the respondent is alleged to have transgressed. For instance, if the petitioner's complaint is on the irregularity in counting votes, he must factually account for the incident and then he has to state briefly why the act complained of is irregular – in the instant illustration, probably transgression of regulation 25 of the Election (Conduct of Election) Regulations 1981. The consequential issue raised by the respondents is that non-compliance with the rule will lead to the dismissal of the petition. The assertion is true if the rule is mandatory and not declaratory in nature. As Lee Hun Hoe J. (as he then was) explained in *Chong Thain Vun* v. *Watson & Another*[5] at p. 73H:

"The question whether the legislature intends a provision to be mandatory or directory must depend in each case on the scope and object of the enactment. Further it is necessary to look at the general scheme of the statute and its express provisions."

Viewed contemporaneously with the others, rule 4 confirms not only the intention of the legislature to expedite the early determination of election petitions but also to prevent any injustice on the defending candidates, whose election is being challenged, against unspecific and unforeseen allegations from irresponsible challengers. Likewise, it is also the object of the election law to equip the successful candidates with early notice of the objection and allegation against him so that he might marshall his facts and preserve his evidence in anticipation of the judicial hearing.

In the first and second petitions (2/86 and 3/86), the allegation that the second respondents in erroneously locating the polling station in a non-gazetted location for about three hours had contravened section 32 of the Act is incorrect. Section 32 does not say that if the returning officer does so he is committing an illegal act. The respondents are not expected to make a guess of what provisions they have transgressed and on the basis of that to prepare a conjectural defence. It is the mandatory obligation of the petitioner to associate his facts with the offending regulations.

Similarly, emptying ballot boxes intermittently while others are being counted could be an offence but the respondent must be given specific notice of which election rules or regulations he is alleged to have offended.

Again the charge on the refusal to effect a recount by the returning officer without specifying how such right arose is clearly not in conformity with rule 4.

In the third petition (4/86), the allegation in paragraphs 3 and 4 briefly read as follows:

"3. At the Pusat Pembilangan Undi at Dewan Bandaran Bachok, after the ballots had all been counted and before the successful candidate was announced I requested that there be a recount.

4. The returning officer without acceding to this request and without ascertaining that I was indeed entitled in law to a recount declared the winner to be Mohd. Zain bin Abdullah."

Even the facts here fall short of the requirements of rule 4. No reason was given as to how the right of the petitioner to a recount has arisen and neither is it stated that the refusal was against any specific provision of the law.

Besides this, the respondents had also raised another serious objection. The petition was taken out by Mohd. Zain bin Ismail and his name appears

in that order on the top of the petition but on the body of the petition he is referred to again as "Mohd. Nor bin Ismail". But the most startling fact is to be found in the Gazette Notification PU(B) 340, exhibited by the respondents, in which the only two candidates who stood for the election were shown as Nik Abdul Aziz bin Nik Mat and Mohd. Zain bin Abdullah. The petitioner therefore is ostensibly not a person qualified to present a petition under section 34 of the Election Offences Act.

For reasons aforesaid, I dismiss all the three petitions pursuant to section 36(a) of the Act. I hereby determine that:

(i) Mohamed bin Haji Ali was duly elected to the Kelantan parliamentary constituency of P22 Nilam Puri;

(ii) Annuar bin Haji Musa was duly elected to the Kelantan state constituency of N18 Peringat; and

(iii) Mohd. Zain bin Abdullah was duly elected to the Kelantan parliamentary constituency of P23 Bachok.

A certificate to this effect containing my report negating the commission of any corrupt or illegal practice shall be issued to the election commission.

Order accordingly.

Solicitors: *C. Jegathesan & Co.; Yusof & Apandi.*

YEAP MAH EE v. KUAN KUM CHIEW & ANOR.

[O.C.J. (Edgar Joseph Jr. J.) 1 February 1988]

[Penang – Originating Motion No. 32-10-87]

Civil Procedure – Injunction – Discharge of – Application for – Ex parte application – Whether need to show all the documents – Whether there was serious question to be tried – Whether damages would be an adequate remedy – Where the balance of convenience lies – Merits of application.

The respondent was occupying the ground floor front portion of certain premises of which the applicant was the registered proprietor. Prior to the present tenancy agreement, there were seven other tenancy agreements which gave the respondent the right to occupy the ground floor front portion of the premises.

The applicant forcibly tried to demolish the back portion of the premises which the respondent was also using. The respondent therefore sought an *ex parte* interlocutory injunction to prevent the demolition by the applicant. The injunction was granted by the court. The applicant thereafter made the present application to discharge the injunction granted to the respondent.

Held, dismissing the application: (1) the non-production of the seven previous agreements at the *ex parte* stage did not amount to a suppression of material facts. A party applying for an *ex parte* interlocutory injunctive relief, particularly in cases of real emergency where time is of the essence (and there was *prima facie* evidence that the present case was such a case), is not expected to put forward a fully documented case. Certainly he is not required to inform the court of every fact that might reinforce his own case;

(2) the ground that there was no serious question to be tried had no substance;

(3) damages would not be an adequate remedy;

(4) the balance of convenience favours the respondent rather than the applicant.

Cases referred to:

(1) *Re N (Infants)* [1967] Ch. 512 (cited).
(2) *P.S. Refson & Co. Ltd.* v. *Saggers And Another* [1984] 1 W.L.R. 1025 (cited).
(3) *Lee* v. *Department of Education and Science* (1967) (unreported) *Atkin's Court Forms* Vol. 22 p. 78; see also 24 *Halsbury's Laws of England* 4th Ed. para 1049 (cited).
(4) *WEA Records Ltd.* v. *Visions Channel 4 Ltd. And Others* [1983] 1 W.L.R. 721 (cited).
(5) *Addiscombe Garden Estates Ltd. And Another* v. *Crabbe And Others* [1958] 1 Q.B. 513 (cited).
(6) *Street* v. *Mountford* [1985] A.C. 809 (refd).
(7) *Re a Debtor (No. 75N of 1982, Warrington), ex parte The Debtor* v. *National Westminster Bank plc.* [1983] 3 All E.R. 545 (cited).
(8) *Luganda* v. *Service Hotels Ltd.* [1969] 2 Ch. 209 (cited).
(9) *American Cyanamid* v. *Ethicon Ltd.* [1975] 1 All E.R. 504, 510D (apprvd).
(10) *Tan Cheng Wee* v. *Ng Hye Kok* [1966] 1 M.L.J. 209 (cited).
(11) *Brown* v. *Draper* [1944] 1 All E.R. 246 (cited).
(12) *Chan Swee Kin* v. *Tang Wooi Yin* [1983] 1 M.L.J. 261, 263 (cited).
(13) *S.E.A. Housing Corporation Sdn. Bhd.* v. *Lee Poh Choo* [1982] 2 M.L.J. 31 (cited).
(14) *National Provincial Bank* v. *Marshall* (1888) 40 Ch.D. 112 (cited).
(15) *Tan Suan Heoh* v. *Lim Teck Ming & 2 Ors.* [1987] 2 M.L.J. 466 (cited).
(16) *Lee Kwee Foh Ltd.* v. *Yeong Choon Foong* [1969] 1 M.L.J. xxv (cited).

ORIGINATING MOTION.

Ooi Teik Hoe (*Choo Hong Choy* with him) for the plaintiff.

Tan Lean Tee for the defendants.

Cur. Adv. Vult.